No. 13611

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

MELVIN GRIFFETH and LOIS D. GRIFFETH,

Appellants,

vs.

UTAH POWER & LIGHT COMPANY, a Corporation,

Appellee.

Brief of Appellee

Appeal from the United States District Court for
the District of Idaho
Eastern Division

HONORABLE CHASE A. CLARK, *Judge*

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SUBJECT INDEX

TABLE OF AUTHORITIES CITED

STATUTES

RULES

TEXTS

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SUMMARY OF FACTS

Appellants claim that appellee negligently flooded their lands and certain personal property located thereon. By their complaint and amended complaint they seek recovery for damages.

Appellee interposed a motion for summary judgment supported by affidavits. Appellants filed affidavits in opposition but did not deny or put in issue any of the facts set forth in the affidavit supporting appellee's motion. The motion was argued orally and then submitted to the trial court upon written briefs.

The trial court ruled that the flood easement presented and relied upon by appellee was a valid and subsisting easement, and that appellants were bound thereby. The trial court further ruled, in effect, that appellee had made prima facie proof that the things done by it were within the terms of the easement. He reserved for the trial an opportunity for appellants to overcome appellee's prima facie proof, and to prove, if they could, that appellee had abused the rights conferred by the easement (R. 47, 61, 62, 63, 140, 141, 142).

Before the trial began the court announced again his ruling upon the motion for summary judgment and ruled that the appellants would have the burden of proving that in the operation of its business appellee had "abused' the rights granted by the easement (R. 61, 62, 63, 140, 141, 142).

At the close of appellants' case appellee moved for a directed verdict, which motion was granted.

POINTS AND AUTHORITIES

I.

There was no genuine issue of fact before the court on appellee's motion for summary judgment. The facts being uncontradicted, the granting of the motion was required by Rule 56, Federal Rules of Procedure.

Sartor v. Arkansas Natural Gas Corp.,
134 F. 2d 433, 435;

Christianson v. Gaines,
174 F. 2d 534;

Lindsey v. Leavy,
149 F. 2d 899, 902;

Koepke v. Fontecchio,
177 F. 2d 125, 127.

I-A

This court has construed an easement similar to the one under review favorably to appellee's contention.

Luama v. Bunker Hill & Sullivan Mining Co.,
41 F. 2d 358.

I-B

The belated effort of appellants to prove an ancient contract covering and the ancient possession of property covered by easement is condemned by the doctrine of laches.

30 C. J. S., Sec. 119, pp. 542, 543;

Gillons v. Shell Co. of California,
86 F. 2d 600, 609;

The Kermit-Lamborn v. American Ship. etc.,
76 F. 2d 363;

Gifford v. Travelers Protective Assn.,
153 F. 2d 209;

Harris Stanley Coal & Land Co. v. Chesapeake & Ohio R. R. Co.,
154 F. 2d 450, 455;

Barron & Holtzoff, Federal Practice and Procedure, Vol 3, Sec. 1245, p. 125.

II.

The record contains no substantial probative evidence that appellee was guilty of any negligence causing or contributing to the injury complained of.

III.

Appellants' points not sustained by record.

ARGUMENT

I.

PARTIAL GRANTING OF SUMMARY JUDGMENT FULLY JUSTIFIED BY RECORD

On and prior to December 22, 1926, Mr. George Thomas was the owner of the land described in plaintiffs' original complaint. Upon that day he and his wife executed the flood easement involved herein. Because the effect of the easement raises a major point for review and decision, we set it forth here for the convenience of the Court.

> "Inst. No. 27690 RELEASE AND EASEMENT
> "This agreement made and entered into this 22 day of December, 1926, by and between UTAH POWER & LIGHT COMPANY, hereinafter referred to as 'Grantee,' and GEORGE THOMAS and ANNA E. THOMAS, his wife, hereinafter called 'Grantors,' WITNESSETH:
>
> "That for a valuable consideration, the receipt of which

is hereby acknowledged, the Grantors above named hereby release and discharge the Utah Power & Light Company, its successors and assigns, from any and all claims for damages to the lands, crops, or other property of the Grantors heretofore caused by flooding or by the impounding or storage of the waters of Bear River, or by the fluctuation of the flow of said river, or by deposit of ice thereon, or otherwise, and/or due to the maintenance or operation of Grantee's Oneida Power Plant or other plants operated by said Grantee on said Bear River;

"And for said consideration, above named Grantors, their successors and assigns, hereby grant unto said Utah Power & Light Company, its successors and assigns, an easement for the right to continue as aforesaid the manipulation and fluctuation of the flow of said river as it passes in its natural channel through or along the lands owned, claimed or possesseed by the Grantors, located in Section 17, Township 15 South, Range 39 East, B.B.&M., particularly including, but not limited to, the following land, to-wit:

"The Southeast Quarter of the Northwest Quarter, the East half of the Southwest Quarter and the Southwest Quarter of the Southwest Quarter of Section 17, Township 15 South, Range 39 East B.B.&M., excepting approximately 10 acres heretofore transferred to the Riverview Sanitarium Company, containing 150 acres, more or less.

"And for said consideration any damages that may result from future flooding or depositing of ice on said land caused by the fluctuation of the flow of said river in the normal operation of Grantee's plant or plants, up stream from Grantor's land, are hereby waived and released, provided future fluctuations shall not exceed those heretofore occurring in the operation of said Oneida Plant.

"In WITNESS WHEREOF, the parties have hereunto

set their hands this 22 day of December, 1926.

Witness

Flora Eliason George Thomas
Anna E. Thomas."

(Duly acknowledged)

The foregoing easement, together with supporting affidavits, was brought before the court on motion for summary judgment. By the motion for summary judgment and supporting affidavits, appellee assumed and discharged the burden of showing that it owned and possessed the easement pleaded in its answer and that the things done by it in reliance upon the easement were done within the terms of the easement. Having made such proof, the burden then came to rest upon appellants to prove negligence of appellee causing or contributing to their injury. In re Blank's Estate, 11 N.Y.S. 2d 1002. After the Court had ruled upon the motion and the trial was about to commence upon the issue whether there had been any negligent exercise of the rights conferred by the easement, appellants asked leave to amend their complaint, inter alia, by including additional land as the basis for recovering additional damages.

Appellee objected to the amendment upon the ground that the lands sought to be brought into the case by amendment were, like the land described in the original complaint, subject to flood easement and that appellee should be accorded the right to direct a motion for summary judgment to the additional land. Thereupon the following occurred—

> "The Court: Do I understand you to say that this new land they are including in the amendment, that

you also have the same easement?

Mr. Ray: We don't have an abstract of title but we have an easement as to this land.

The Court: Will counsel for the plaintiff admit that they have such easement?

Mr. Anderson: It is my understanding." (R 61)

The foregoing took place in open court and would seem to be a significant admission of the existence of the flood easements relied upon by appellee.

That the easement set forth above was executed and delivered to appellee by George Thomas and his wife was never denied. It was placed of record in the office of the County Recorder of Franklin County, Idaho, on January 12, 1927 (R. 33), and ever since that time has been a matter of public record. In as much as the easement stood of record, subsequent purchasers took with constructive knowledge of the easement. (Idaho Code Sec. 55-811).

The land covered by the easement was conveyed by George Thomas and wife to Edward T. Griffeth by deed dated August 6, 1935, and recorded March 15, 1941. When Edward Griffeth accepted the deed, the easement here under review had been of record for more than eight years. Edward T. Griffeth and wife thereafter conveyed the property to appellants by deed dated September 19, 1946, and recorded September 27, 1946 (R. 33, R. 34). When appellants accepted deed to the land in September of 1946, the easement had been of record for more than nineteen years.

It was held by the Ohio Court in Kyle v. Thompson Admr., 11 Ohio State 616, that a purchaser must look to the state of the recorded title as of the time he completes his purchase, not as of the time he entered into a contract to purchase. Neither the appellants nor their predecessor Edward T. Griffeth can be heard to say that when they took their respective deeds to the property they were without knowledge of the easement. They accepted the deeds knowing that the grantors' titles were subject to the easement and thereby acquired title subject to the easements (Idaho Code, Sec. 55-811).

The Motion for Summary Judgment was supported by the affidavit of J. A. Hale. By his affidavit, it is shown that Hale was employed by appellee in 1913 as a civil engineer; that he had personal knowledge of and personal connection with the construction of the Oneida power dam, referred to in plaintiffs' complaint and by plaintiffs' witnesses, during the years 1913 to 1920, and has had personal knowledge of the operation of the dam at all times since its completion.

Hale deposed that George Thomas was the owner of the land covered by plaintiffs' original complaint and by the easement set forth above, on and prior to December 22, 1926. Prior to that date Thomas made a claim against appellee for the flooding and the icing of the land. Thomas' claim was compromised and settled by the granting and purchasing of the easement.

Finally, Hale deposed of his own knowledge that during the months of December 1948 and January 1949, the period complained of by appellants, the Oneida plant "was operated

normally and in the same manner in which it was operated prior to December 22, 1926" (R. 32). In his affidavit Hale set forth his schooling, training and experience to qualify him to make the statements later set forth in his affidavit. The facts set forth in Hale's affidavit have never been challenged or controverted.

Appellee, having shown without contradiction that it held a valid and subsisting easement, the interpretation of the easement was for the court, and having shown that its operation of the power plant during the times involved was within the only restrictive requirements in the easement, there was no genuine issue of fact and the case was one for disposition under Rule 56.

The following are typical cases reflecting the views of the courts upon Rule 56.

In Sartor v. Ark. Natural Gas Corp., 134 F. 2d 433, 435, the Circuit Court of Appeals for the Fifth Circuit said:

> "We have written often on the nature and effect of Rule 56, Federal Rules of Civil Procedure, 28 U.S.C.A. following section 723c, the rule for summary judgment. Our views, as there expressed, leave in no doubt that the summary judgment rule is a salutary one for the purpose of avoiding unnecessary trials, that is, trials where there is nothing of fact to be tried."

Christianson v. Gaines, 174 F. 2d 534, was decided by the Court of Appeals for the District of Columbia. It is there said in part:

> "Rule 56, Federal Rules of Civil Procedure, 28

> U.S.C.A., is utilized by litigants to secure justice without unnecessary expense and unnecessary delay. It imposes a duty upon the court to sift the issues in the case and to determine which material facts are really at issue and which are not, thereby facilitating and expediting the trial. This pre-trial sifting is quite similar to the pre-trial procedure provided in Rule 16, except that under Rule 56 (d) it is compulsory while under Rule 16 it is discretionary with the court. Rule 8 (a) of the Federal Rules, as amended, provides that 'a pleading which sets forth a claim for relief * * * shall contain * * * (2) a short and plain statement of the claim showing that the pleader is entitled to relief * * *.' Reading Rule 56 and Rule 8 (a) together, it was the duty of the court to determine whether or not there was a genuine issue of fact in controversy. If so, the parties were entitled to trial and, if not, summary judgment was proper. See 3 Moore, Federal Practice Sec. 56.01 (1938)."

After making the foregoing statement the District of Columbia Court of Appeals quoted with approval the following significant language from the Ninth Circuit Court of Appeals, in Lindsey v. Leavy, 149 F. 2d 899, 902:

> " 'The sufficiency of the allegations of a complaint do not determine the motion for summary judgment. Cases dealing with and construing Rule 56, Federal Rules of Civil Procedure, 28 U.S.C.A. following section 723c, clearly indicate to the contrary and if this were not the case, Rule 56 would be a nullity for it would merely duplicate the motion to dismiss.' "

The foregoing is especially pertinent here because it squarely meets appellants' contention that paragraph VI of their complaint defeats the application of Rule 56.

See also, Koepke v. Fontecchio, 177 F. 2d 125, 127, wherein the Eighth Circuit Court of Appeals observed that:

> "The purpose of the procedural rule 56, Federal Rules of Civil Procedure, 28 U.S.C.A., providing for the rendering of summary judgment is to dispose of cases where there is no genuine issue of fact even though an issue may be raised formally by the pleadings. In the instant case there was no dispute as to the character of the premises nor the use that was being made of them by appellee. Neither was there any doubt as to when the premises assumed their present character. The court fixed the date from the undisputed evidence as October 1, 1947. We think there was no genuine issue as to any material facts and hence the record presented a proper case so far as procedure is concerned for the filing of a motion for summary judgment."

The construction of the contract is for the court and, if we have been correctly taught upon the subject, the court will, in the process of construction, place itself as nearly as can be in the situation of the parties at the time of the execution of the agreement so as to arrive at the purpose and intent of the parties.

An inspection of the easement reveals the situation of the parties and the background against which they dealt. Prior to December 22, 1926 the water of Bear River had left its channel and flooded the lands of Thomas. He claimed that the flooding resulted from fluctuation of the river due to the operation by defendant of its Oneida power plant upstream from the Thomas lands. He asserted a claim for damages, and the easement expresses the agreement of the parties by which that claim was settled.

By the language of the second paragraph of the easement, Thomas acknowledged receipt of payment, and in consideration therefor released defendant from all claims for damages "heretofore caused by flooding." There can be no doubt that Thomas' lands had been flooded. Flooding, and consequent damage, and the prospect of future flooding, was the subject matter with respect to which the parties were agreeing.

By paragraph 3 of the easement, Thomas granted to defendant the right to continue "as aforesaid the manipulation and fluctuation of the flow of the river as it passes in its natural channel through or along lands claimed or owned by grantors." Appellants would lift the foregoing phrase from context and seize upon it as showing that the easement granted only the right to fluctuate water within the confines of the channel. It is a well recognized rule of law that parties to a contract will not be held to have contracted for an idle or useless thing, and that an interpretation or construction will be favored which is reasonable as opposed to one which is absurd.

As long as the river remains within its banks there can be no flooding, and therefore no damage. The parties were contracting with respect to flooding, and it would have been an idle and useless thing for Thomas to attempt to sell, and for the defendant to buy, the right to permit water to pass down the natural channel of the stream. The significant words in paragraph 3 are "as aforesaid." The right was granted to manipulate and fluctuate the stream at the power plant "as aforesaid," which means that defendant acquired the right to fluctuate the flow as it had done prior to the date of the ease-

ment. Previously the stream had flooded the Thomas land only because it left the natural channel. Thomas claimed that fluctuation "as aforesaid" had resulted in the flooding of his land, and he granted to the defendant the right to "fluctuate as aforesaid."

The last paragraph of the easement leaves it perfectly plain that for the consideration paid him, Thomas waived and released defendant from any and all damages which in the future might result from the flooding of the lands by reason of the normal operation of the power plant, provided future fluctuations of stream flow at the power plant should not exceed those heretofore occurring in the operation of the plant.

One fact which clearly confronted the parties to the agreement was that the land had been flooded. Another fact was that such flooding might recur from time to time. The subject matter of their dealings was a flood which had occurred, and floods which might occur in the future. Of course, they were not concerned with water which remained harmlessly within the channel. For the consideration paid Thomas he charged the land involved with the burden of receiving flood waters from the Bear River. That a flood might occur in the future was clearly within the contemplation of the parties, and it was the expressed intention of the parties that any damages which might result from such future flooding would be and was paid for in advance by defendant. Such payment was made and acknowledged by Thomas.

The only limitation upon the effectiveness of the easement granted was that any future flooding should not result

from fluctuations of stream flow *at the Oneida power plant* exceeding "those heretofore occurring in the operation of the Oneida plant." This is clear recognition that while defendant might control the fluctuation of the flow at its plant, it did not control forces which might operate downstream from the power plant.

What were the facts before the Court on the question whether the stream fluctuation on January 7, 1949, exceeded fluctuations "heretofore occurring?"

In Paragraph 6 of the platintiffs' complaint it is alleged in effect that the banks of the river near plaintiffs' land were unable to confine the amount of water discharged into the stream by defendant. There is no allegation that the fluctuation of flow at the plant exceeded the fluctations "heretofore occurring." Once before, prior to December 22, 1926, the water got out of its banks and onto the Thomas lands, and it was agreed by the parties that such might happen again. It did happen in 1949, twenty-six years later, but the land was then subject to the burden of the easement. Any damage from such flooding had been anticipated in 1926, and paid for in advance by the consideration acknowledged in the easement.

By the affidavit of J. A. Hale, his close identification with the engineering problems of the defendant, including the construction and operation of the Oneida plant, is shown. All through the years Hale has been personally familiar with the operation of the Oneida plant, from the construction of the plant, without interruption, to and including the present time. And he proves without dispute that the operation of the plant at the time complained of in plaintiffs' complaint

was normal operation, and that the fluctuation of the stream flow at the plant on those days did not exceed fluctuations occurring prior to December 22, 1926. His affidavit shows his training and experience, and his competency to understand the matters concerning which he deposed. It also shows that statements are made upon personal knowledge (R. 27-32).

There is no conflict made by the counter-affidavits. Evelyn Griffeth deposes that the water overflowed the lands involved. That was just the event against which defendant sought insurance when it purchased the easement. Evelyn Griffeth did not depose, and would have been incompetent to depose, that the fluctuation of flow upstream at the power plant exceeded fluctuations occurring prior to 1926. And so with the affidavit of Edward Griffeth. He deposes that since he has been in possession of the land he has not been flooded. But what defendant acquired was not an easement for keeping water in the channel and off the land but one which would provide against flooding. Edward Griffeth did not, and could not, make proof that fluctuation of flow at the power plant on January 7, 1949, exceeded fluctuations occurring prior to December 22, 1926.

Many causes might intervene to affect the behavior of the stream below the Oneida plant and cause the flooding of plantiffs' lands. But two factors would have to exist concurrently before defendant could be held liable. First, the fluctuation of the stream by defendant at the power plant would have to exceed the standard fixed by the terms of the easement, and second, the conduct of the defendant would have to be negligent. If the fluctuation of the stream remains with-

in the limitations fixed by the easement there can be no recovery against the Power Company for flooding, even though such flooding is caused or contributed to by the operation of the power plant.

THIS COURT HAS CONSTRUED AN EASEMENT SIMILAR TO THE ONE UNDER REVIEW FAVORABLY TO APPELLEE'S CONTENTION

I-A

We respectfully submit that Luama v. Bunker Hill & Sullivan Mining Co., 41 F. 2d 358, is controlling here. That case was tried before Judge Cavanah, and his decision was affirmed on appeal by the Circuit Court of Appeals for the Ninth Circuit. In that case an easement had been given to defendants by the plaintiff's predecessor in interest. The easement authorized the wasting of tailings and other material into the stream above plaintiff's land, and charged the land of plaintiff with the burden of such damages as might result from the flooding and the consequent deposition of foreign matter upon the riparian soil. The events contemplated by the easement occurred. Tailings were discharged into the streams. Flood waters covered the land and when they receded they left tailings and other impurities upon the soil. The easement was held to be a complete defense as a matter of law. That case was tried before the adoption of the new Federal Rules of Civil Procedure, and upon the trial the court held that the easement barred any recovery for the flooding. The same case would now be disposed of upon summary judgment under Rule 56.

I-B

THE BELATED EFFORT OF APPELLANTS TO PROVE AN ANCIENT CONTRACT COVERING AND THE ANCIENT POSSESSION OF PROPERTY COVERED BY EASEMENT IS CONDEMNED BY THE DOCTRINE OF LACHES.

Appellants would make much of the affidavit of Edward T. Griffeth filed in opposition to the Motion for Summary Judgment. By that affidavit an attempt was made to set up an equitable barrier to the operation of the easement. They would nullify the easement by the statement that at some indefinite and uncertain time prior to December 22, 1926, Griffeth entered upon a written contract with Thomas for the purchase of the land involved and went into possession of the property pursuant to such contract (R. 43).

There are two answers to the contention: (1) The affidavit of Edward T. Griffeth fails to satisfy the clear requirements of Rule 56 (e) and (2) the contention comes too late to escape the application of the rule of laches.

A part of Rule 56 (e) provides:

> "Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith."

Instead of attaching to his affidavit the contract referred to and relied upon, he states: "This affiant does not have the original contract entered into or a copy thereof and does not

know where such contract is or if it is in existence in truth" (R. 43). There is a clear failure to comply with the requirements of the rule. Appellants now seem to claim that Griffeth's alleged ancient possession should have put appellee upon notice of the contract and the rights of Griffeths thereunder, but he makes no lawful showing of the terms of any such contract. Since he specifically deposes that his possession was pursuant to the contract, it was essential for him to attach the contract to the affidavit; otherwise only speculation could possibly determine what the terms of the contract were. The contract might well have recited that Griffeths' right to possession should fall subsequent to the date of the easement, or it might have contained other terms wholly destructive to appellants' present contention.

It will be remembered that George Thomas gave the easement under review on December 22, 1926. It was placed of record on January 12, 1927. All through the years since January 12, 1927, the easement has been a matter of public record, and the record has been notice to all the world, including appellants and their predecessor in interest, Edward T. Griffeth. The easement remained unchallenged until May 22, 1952, a period of more than twenty-five years. Through all of those years, until April 11, 1951, George Thomas, grantor of the easement, lived and would have been available as a witness. He died on that day, and by his death appellee was deprived of an essential source of evidence as to the true facts of the matter under review. Under these circumstances the rule of laches will not permit the claims of Griffeth to nullify the easement. In 30 C.J.S., Sec. 119, page 542, 543, the following appears:

> "A court of equity will refuse relief after inexcusable delay because of the difficulty, if not the impossibility, of arriving at a safe and certain conclusion as to the truth of the matters in controversy and doing justice between the parties, where the evidence has been lost or become obscured through the loss of documents, or through death or disappearance of one or more of the participants in the transaction in suit or of the witnesses thereto, or through impairment of the memory of participants or witnesses still living. While the rule requires for its support no element of estoppel, but is founded on public policy, the fact that the delay has tended to defeat defendant's power to prove his right is an additional reason for its application; and relief is more readily denied in case of the death of a party to the transaction than in other cases, since his death usually presents difficulties in procuring evidence and conducting the defense other than those arising from the mere loss of his testimony. To bring the rule into operation, it is not necessary that the court should be convinced that the original claim was unjust or has been satisfied; it is sufficient if the court believes that under the circumstances it is too late to ascertain the merits of the controversy."

The foregoing statement of the rule has been twice quoted and adopted as the law by this Court.

See, Gillons v. Shell Oil Co.,
86 F. 2d 600, 609;

The Kermit-Lamborn v. American Ship, etc.,
76 F. 2d 363.

At page 125, sec. 1245, Barron & Holtzoff, Federal Practice and Procedure, Vol. 3, it is stated:

> "A summary judgment for defendant may be granted if the claim asserted against him is barred by the statute of limitations or by laches."

In Harris Stanley Coal & Land Co. v. Chesapeake & O. Ry. Co., 154 F 2d 450, the Circuit Court of Appeals for the Sixth Circuit, at page 455, says:

> "Rule 56 (c) of the Federal Rules of Civil Procedure, provides that if there is no genuine issue as to any material fact that the moving parties are entitled to judgment as a matter of law. The purpose of the rule is to dispose of cases where there is no genuine issue as to material facts. Fletcher v. Krise, 73 App. D.C. 266, 120 F. 2d 809; Miller v. Miller, 74 App. D.C. 216 122 F. 2d 209; Board of Public Instruction v. Meredith, 5 Cir., 119 F. 2d 712. See commentary of Dean (now Judge) Clark, 15 A.B.A. Journal 82, 83. The federal courts have long recognized and enforced state summary judgment statutes. Atkinson v. Bank of Manhattan Trust Co., 7 Cir. 69 F. 2d 735; Schreffler v. Bowles, 10 Cir., 153 F. 2d 1, and such judgments may issue for laches or because of limitation. Gifford v. Travelers Protective Ass'n. of America, 9 Cir., 153 F. 2d 209. The issues here presented by the record and pleadings primarily involve questions of law. The court was empowered to enter a summary judgment."

Gifford v. Travelers Protective Assn. of America was decided by this court. It involved a limitation prescribed by an insurance policy. Under the applicable law of California the limitation so provided was binding if the period provided was reasonable in the judgment of the court. The trial court found the limitation to be reasonable and granted summary

judgment. This court affirmed. We construe the opinion of the court to mean that it was a matter of law for the trial court to decide whether the period provided in the policy was fair and reasonable. In the case now under review appellants withheld their claim of defect in the easement for a period longer than twenty-five years and until Thomas, who could have testified as to the facts, was dead. The trial court ruled as a matter of law that the delay was so great as to invoke the doctrine of laches.

Another reason why the doctrine of laches should apply is to be found in the fact that the easement given by Thomas to the appellee contains this language:

> "Grantor and his successors and assigns hereby grant unto Utah Power & Light Company, etc."

Under the laws of the State of Idaho the use of the word "grant" in a conveyance implies a warranty that the instrument conveys all it purports to convey and that previous to the time of execution of such conveyance the grantor has not conveyed the same estate, or any right, title or interest therein to any person other than the grantee. (Idaho Code Section 55-612).

If there were any defects in the title granted by Thomas, to appellee, appellee would have had recourse against Thomas but appellants withheld assertion of their equitable right until Thomas died, twenty-five years after the grant.

II.

THE RECORD CONTAINS NO SUBSTANTIAL PROBATIVE EVIDENCE THAT APPELLEE WAS GUILTY OF ANY NEGLIGENCE CAUSING OR CONTRIBUTING TO THE INJURY COMPLAINED OF.

Appellant Melvin Griffeth took the stand in his own behalf and produced members of his family and neighbors who testified in his behalf. Melvin Griffeth showed that his land was flooded on January 7, 1949, but he produced no evidence that such flooding resulted from the negligence of appellee.

The trial court, at the close of the trial, made statements to the jury which contained this language:

> "The Court: I don't know how the Court can determine where this water came from. There is no evidence showing the handling of the dam at all. There is no evidence that this water came from the dam. The evidence shows an ice jam in the river of some fifteen feet or more in depth according to one witness. However, there is no evidence that the defendant was responsible for the ice jam, not one bit of evidence that I can determine to this effect." (R. 127).
>
> "The evidence shows that there was an ice jam in the river and that the ice jam was the cause of the flooding of the land." (R. 143 & 144).

Those statements just about sum up the evidence of appellants and all of their witnesses.

Upon his cross-examination, appellant Melvin Griffeth pointed out the real cause of the ice jam and his consequent damage.

"Q. With respect to the temperature prevailing before that time and at that time, do you remember that temperature?

"A. I remember that it was cold.

"Q. Do you remember the time that it was 33 degrees below zero?

"A. Thirty-three below.

"Q. Do you remember that figure given by Mr. Anderson?

"A. Yes, sir.

"Q. Now, when was that with relation to the 7th of January?

"A. Near that time.

"Q. Just before?

"A. Yes, sir; just before.

"Q. For a week or ten days immediately preceding the 7th of January were they uncommonly cold days?

"A. Yes, sir; they were.

"Q. It was an extremely severe winter?

"A. Yes, sir.

"Q. It stayed zero or below every day for several days?

"A. Yes, sir.

"Q. So that the period immediately preceding the 7th of January, 1949, was excessively cold?

"A. Yes, sir.

"Q. Colder than you had had for many years for such a long time?

"A. Yes, Sir." (R.84)

The effect of Melvin Griffeth's testimony was to show that cold weather of unprecedented severity persisted for a period of several days next preceding the formation of the ice jam which diverted the water onto his land. That proves only what the laws of nature teach us, that persistent cold weather will freeze running water and cause ice jams. To the extent that the ice jam dammed the flow of water, there would be more water at that point than normally. But his testimony does not prove any negligence in the operation of the power dam or any other negligence of appellee. V. D. Smart and Clarence Talbott testified that an ice jam formed and the land was flooded, but they added nothing to the testimony of Melvin Griffeth relating to appellee. Edward T. Griffeth testified that he never saw the land flooded before, but that just as cold weather had prevailed prior to 1926. The cold weather of 1926 doubtless accounted for the flooding referred to in the easement. Marion H. Wynn testified that there was an ice jam; that the water backed up behind it and that several streams flowed into Bear River between appellant's land and appellee's power plant.

John Warrick stated that the land was flooded as claimed by appellant. He denied that the river had theretofore overflowed its banks, but upon cross-examination admitted that he had granted and been paid for an easement for the flooding of his land adjoining those of appellant.

Ernest Carter, W. G. Palmer, Delos Griffeth and Evelyn Griffeth simply testified that the weather was cold; that there was an ice jam; which impounded the water and appellants' lands were flooded.

After appellants had rested and appellee had made its motion for a directed verdict, the trial court, upon motion of appellants, reopened the case, whereupon appellants called J. A. Hale to the witness stand. After being sworn, he identified himself as vice president in charge of engineering for appellee and stated that he was familiar with appellee's Oneida dam. He also stated that he was familiar with the operation of the Oneida dam and he is the same J. A. Hale whose affidavit was filed in support of appellee's motion for summary judgment. Over the objection of appellee's counsel, Hale was examined by appellants' counsel with respect to certain pretrial interrogatories submitted to and answered under oath by him. He was available to answer any question which might be propounded by appellants, but appellants were content to have him identify his answer to the interrogatories. The interrogatories propounded before the trial and Hale's answers were put in the record by appellants while Hale was upon the witness stand. Appellants thus got into the record the following questions and answers:

"Interrogatory No. 20: Do you know whether or

not an ice jam occurred in Bear River in the vicinity of or where it flows through lands of plaintiff described in his complaint, which caused said river to overflow over and on the lands described in Plaintiffs' complaint?

"Answer: We have been informed that an ice jam occurred at the time referred to in interrogatory 20 which caused the overflow of plaintiffs' land.

"Interrogatory No. 21: If your answer to the foregoing question is 'yes,' will you state to what extent, if any, your regulation, manipulation and fluctuation of the flow of water in Bear River contributed to or caused said ice jams to occur, resulting in the flooding of plaintiffs' lands.

"Answer: None." (R. 138)

From the foregoing it will appear that the answer of Hale furnishes the only evidence produced by appellants upon the question whether the power company's operation had anything to do with the formation of the ice jam and the flooding of plaintiffs' land. Appellants are left then with the record which shows that the activity of the appellee had nothing to do with the flooding of appellants' land.

From the foregoing we respectfully submit it is made to appear that wholly independently of the easement relied upon, appellee's motion for a directed verdict was good because of the complete failure of appellants to produce any evidence of negligence on the part of appellee causing or contributing to the flooding of appellants' lands.

III.

APPELLANTS' POINTS NOT SUSTAINED BY RECORD

Appellants' Point I, their brief, p. 20. No genuine issue of fact was created by Edward Griffeth's affidavits. Appellants cite cases in support of the rule that possession of land by a vendee is sufficient to put others on inquiry as to his rights. In Simmons Creek Coal Co. v. Doran, 143 U.S. 475, 12 S. Ct. 239, 35 L. Ed. 1063, it is stated that "actual and unequivocal possession" gives notice, and in Kirby v. Talmage, 160 U.S. 379, 16 S. Ct. 349, 40 L. Ed. 463, it is said that "open, notorious and continued possession under apparent claim of ownership" will give notice. Griffeth, in his affidavit, was unable to specify any rights conferred by the contract which he could not find, and he did not set forth the nature of his claimed possession.

We have heretofore pointed out that the pretended claim of an ancient contract and an ancient possession were condemned by the trial court because assertion of the claims was so long delayed as to bring them within the rule of laches. See argument and cases cited pages 17 through 21 above.

Appellants' Point II, their brief, page 21. The intention of the parties and the interpretation of the easement was for the court and not the jury. The subject is fully covered in our argument at pages 11 to 16 above. No cases cited by appellants would authorize a construction of the easement which would defeat the clearly expressed purposes and intentions of the parties.

Appellants' Point III, their brief, page 24. Here appellants attempt to show evidence upon which a jury could find that appellee negligently caused the flooding. Contrary to the rules of this court, appellants' counsel failed to relate their recital of facts to appropriate or any pages of the record. At page 80 appellant Melvin Griffeth spoke generally of what had happened during the winter months, but the evidence there set forth does not sustain the claims made for it by counsel. Griffeth made no statements that would support finding of negligence on the part of appellee. He stated only what generally could be expected from year to year.

It is worthy of note that on page 82 of the record there appears testimony of the appellant Melvin Griffeth that he did not know of the existence of the ice jam which caused the flooding on January 7 until after the flooding. He was watching the river carefully for several days prior to the flooding but he was unaware of the very ice jam which caused his damage. It must be assumed that the offending ice jam developed too rapidly to give Griffeth or anyone else warning of what was about to occur.

In their argument on Point III, page 26 of their Brief, appellants set forth in quotation marks the following:

> "there is no question that a person cannot by a dam, embankment or other artificial means obstruct the natural flow of water in a stream and cause it to overflow or run upon a reparian owner's land."

Immediately following the foregoing is a citation to Chandler v. Drainage District No. 2 of Boundary County, 68

Ida. 42, 187 P. 2d 971. Reference to that decision shows that the Court's language, (P. 973, Pacific Reports) was this:

> "There is no question that a person cannot by a dam, embankment, or other artificial means obstruct the natural flow of water of a stream and throw it back on the land of another without being liable for the resulting damages, *unless he has an easement or right upon or in such lands to do so.*"

It is without dispute in the record that the flooding of appellants' land resulted from ice in the river and not from any dam built by appellee. There is no evidence in the record that appellee negligently or otherwise caused the ice jam. It is equally undisputed in the record that appellee had an easement permitting it to cause the flooding of the land involved.

In addition to Chandler v. Drainage District No. 2 etc., supra, appellants rely upon Scott v. Watkins, 63 Ida. 506, 122 P. 2d 220; Fisher v. Davis, 19 Ida. 493, 116 P 412; and Hall v. Washington Water Power Co., 27 Ida. 437, 149 P. 507. All of those cases are clearly distinguishable from the case here under review. In each of those cases the defendant actually constructed a dam or other barrier to the flow of the stream. In Scott v. Watkins, supra, plaintiff alleged and proved the construction of a dam across a slough, which caused the backing up of water onto plaintiff's land. Plaintiff also made proof that he had consented to the construction of the dam subject to provision for drainage of the water through a box or sluice. He then proved failure of the defendant to provide the box or sluice in accordance with the agreement. Under those facts it was held plaintiff was entitled to recover.

In Fisher v. Davis, supra, plaintiff proved that defendant had built cribs in the Boise River to divert the channel away from his own lands and prevent erosion. Proof showed that defendant had gone so far in his efforts to divert the current as to cause it to cross the river and flood the plaintiff's land. In that case there was clear proof of the actual construction of the dam and that the construction was the proximate cause of plaintiff's injury.

In Hall v. Washington Water Power, supra, the construction of a dam across the water way by the defendant was alleged and proved by the plaintiff, but plaintiff failed to prove that the construction of the dam was the proximate cause of his injury. He was therefore nonsuited and the order of nonsuit was affirmed.

In Thies v. Platte Valley Public Power etc., 289 N.W. 386, 137 Nebr. 344, the Nebraska court was dealing with a set of facts clearly distinguishable from those presently under review. In that case the plaintiffs, being under the burden of proving negligence on the part of defendant and a causal connection between that negilgence and their injury, produced qualified engineers who testified that the operation of the dam was such as to produce, and did produce, the ice jams and the resultant flooding. In the case before us the only qualified engineer who was sworn and testified was J. A. Hale, and his uncontradicted testimony is that the formation of the ice jam which caused the flooding of appellants' land was not caused or contributed to by the operation of the dam (R. 138-139).

Appellants' Point IV, their brief, page 27. Appellants' argument under this point evidences a refusal or reluctance to

recognize the effect of the trial court's ruling on the Motion for Summary Judgment. By its motion for summary judgment appellee brought before the court the easement. It proved the circumstances under which the easement was granted. It proved the granting and recording of the easement and then took the next step and proved that the operation of the power plant at the time complained of by the plaintiffs was within any restrictions contained within the easement (R. 27-32). There was no genuine issue presented to the court involving these facts. They went unchallenged and were subject to disposal by the court under Rule 56. In disposing of the motion for summary judgment the court ruled without reservation that the easement was a valid and subsisting easement. He then, in effect, ruled that appellee had made prima facie proof of its compliance with the restrictions in the easement. The case might have been disposed of upon its merits at that point, but the trial court reserved an opportunity for appellants to meet the prima facie case made by appellee with respect to the operation of the power plant. The effect of this ruling was to accord an opportunity to the plaintiffs which the trial judge might well have withheld in his ruling on the motion for summary judgment.

The rule announced in the cases relied upon by appellants that a defendant who pleads an affirmative defense assumes the burden of proving it has been fully satisfied as shown by the record in this case.

No evidence was offered by appellants that appellee had departed from the terms of the easement. When trial began appellants were confronted with a pretrial adjudication that

appellee owned and possessed the easement, and a ruling that appellee had made a prima facie case of compliance with the terms of the easement. There was no evidence before the jury as to the extent, if any, of stream flow fluctuation at the plant in excess of normal fluctuations which had occurred prior to the granting of the easement. It was up to appellants then to make proof of negligence upon the part of appellee causing or contributing to the injury. The only proof they made upon that particular point was made through the witness Hale, whose uncontradicted testimony was that the operation of the power plant had no effect upon the flooding of appellants' land.

Appellants' Point V, their brief page 31. This point is a summary and presents no matter not already covered by the preceeding argument. Appellants in Point V again show their unwillingness to construe the easement as a whole. They ignore the last paragraph of the easement which charges the land with the burden of receiving ice and water from the river.

CONCLUSION

Appellants by their original complaint charged appellee with flooding their property and negligently operating the Oneida power plant.

Appellee filed its answer denying all charges of negligence. It pleaded a flood easement in defense of appellants' claim. Appellee then elected to avail itself of the procedure provided

by Rule 56 of the Federal Rules of Civil Procedure. By motion and affidavit it proved:

(a) That it had a valid and subsisting flood easement covering the lands in suit; and,

(b) That the operation of its plant was within the restrictions of the easement.

The trial court ruled that proof of the easement had been made; that the easement was valid and binding upon appellants; and that prima facie proof of compliance with restrictions in the easement had been made.

The order of the court reserved to appellants an opportunity to prove negligent operation of the power plant which went beyond the terms of the easement.

Appellants failed to prove abuse of the terms of the easement and failed to prove any causal connection between the flooding of their lands and the conduct of appellee.

At the beginning of the trial when the amendment was permitted to include additional lands, appellants admitted the existence of the easements.

Through the witness Hale, appellants proved that there was no connection between the operation of the power plant and the flooding of the land.

A directed verdict was ordered, and we respectfully submit the order should be affirmed.

Respectfully submitted,

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APPENDIX "A"

Sec. 55-612, Idaho Code, COVENANTS IMPLIED FROM GRANT.—From the use of the word "grant" in any conveyance by which an estate of inheritance, possessory right, or fee simple is to be passed, the following covenants, and none other, on the part of the grantor, for himself and his heirs, to the grantee, his heirs and assigns, are implied, unless restrained by express terms contained in such conveyance.

1. That previous to the time of the execution of such conveyance, the grantor has not conveyed the same estate, or any right, title or interest therein, to any person other than the grantee. * * *

Sec. 55-811, Idaho Code. RECORD AS NOTICE.—Every conveyance of real property acknowledged or proved, and certified, and recorded as prescribed by law, from the time it is filed with the recorder for record, is constructive notice of the contents thereof to subsequent purchasers and mortgag (e) es.

Every conveyance of real property acknowledged or proved, and certified, and recorded as prescribed by law, and which is exceuted by one who thereafter acquires an interest in said real property by a conveyance which is constructive notice as aforesaid, is, from the time such latter conveyance is filed with the recorder for record, constructive notice of the contents thereof to subsequent purchasers and mortgagees.